SUPREME COURT, U. S.

73-1747

JUN 18 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1974

NO. A-960

COORS PORCELAIN COMPANY,

Petitioner,

v.

STATE OF COLORADO,
and JOHN H. HECKERS,
Director of Revenue,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

Contrary to the position of the petitioner, it is respectfully submitted that the questions presented are:

1. Whether the Colorado Supreme Court erred in employing Federal Public Law 86-272, 15 U.S.C. 381 as the standard to determine if a domestic Colorado corporation (Coors) is "doing business" outside the State of

Colorado for purposes of imposing Colorado corporate income tax on Coors.

2. Does the formula for allocation of domestic and foreign income contained in C.R.S. 1963, 138-1-37, as amended, (Supp. 1965), which provides that:

> "If the corporation carries on no business outside of Colorado, the whole of the remainder of the net income shall be allocated to Colorado,"

violate the interstate commerce and due process clauses of the United States Constitution?

STATEMENT OF THE CASE

The petitioner's statement of the case is substantially accurate, except that the Colorado Supreme Court and the trial court concluded that Coors' out of state business did not extend beyond solicitation of orders. It is respectfully submitted that the Colorado Supreme Court did no more than decide whether or not Coors was doing business outside the State of Colorado and that the Colorado taxing statute at issue is not unconstitutional.

REASONS FOR NOT GRANTING THE WRIT

A. The decision of the Colorado Supreme Court does not present a Federal question of substance not yet determined by the United States Supreme Court or determined contrary to a prior United States Supreme Court decision. The Colorado Supreme Court decided that Coors is not "doing business" outside Colorado under the standard found in Public Law 86-272, therefore, under C.R.S. 1963, 138-1-37, as amended, (Supp. 1965), the entire net income of Coors is to be allocated to Colorado for income tax purposes. Coors argues that the Colorado Supreme Court

decision is contrary to the holding in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S. Ct. 357 (1959). It is respectfully submitted that the Colorado decision is clearly consistent with that case. It is the respondents' position that Public Law 86-272 did not negate the effect of the *Northwestern* decision, but only defined more clearly the limits of said case. The relationship between the *Northwestern* case and Public Law 86-272, 15 U.S.C. § 381, was interpreted in *Heublein, Inc., v. South Carolina Tax Commission,* 409 U.S. 275, 93 S. Ct. 483, 34 L.Ed 472 (1972), where this court stated:

> "The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S. Ct. 357, 3 L.Ed.2d 421 (1959). There we held that 'net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.' 358 U.S., at 452, 79 S. Ct., at 359. Congress promptly responded to the 'considerable concern and uncertainty' and the 'serious apprehension in the commercial community' generated by this decision by enacting Pub. L. No. 86-272, 15 U.S.C. § 381, within seven months.
>
> "In this statute, Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a 'sufficient nexus' for the exercise of the State's power to

tax. Section 381 was designed to define clearly a lower limit for the exercise of that power."

The legislative history of § 381 shows that Congress had rather limited purposes which are not evaded by Colorado statutes and regulations governing corporate income tax imposed on domestic corporations. Congress did not focus on the consequences of its action for such local taxable schemes. Therefore § 381 cannot be read as prohibiting the states from enacting such schemes. Such a reading would require the assumption that Congress carefully considered the difficult problems of accommodating the Federal interest in open national economy with local interest in taxing domestic corporations. The evidence is clear that Congress did not do so.

Section 381 was designed to define clearly the lower limit of the states' power in taxing business activities. The states' interest in taxing below a certain limit (solicitation) was weaker than the national interest in promoting an open economy. The Colorado Supreme Court merely applied the standard set forth in Public Law 86-272 as to the issue of "doing business", but did not use said law to exempt from taxation. Coors argues such standard does not apply to domestic corporations. Under the Coors proposed double standard, the foreign states could not tax Coors' income generated by the activity in those states because that activity was less than the minimum established by the Federal legislation; and additionally, Colorado, by having a different standard for domestic corporations than the Federal statute forces it to have for foreign corporations, would also be unable to tax that income . Thus, Coors would completely avoid paying state income taxes on its activities outside Colorado. This was clearly not the intent of Public Law 86-272 and this is what C.R.S. 1963, 138-1-35, 37, as amended (Supp. 1965) seeks to prevent.

Therefore, the petitioner fails to show that the Colorado Supreme Court decision is contrary to the *Northwestern* case or any other prior U.S. Supreme Court case and in the absence of the above, there can be no review on certiorari. U.S. Supreme Court Rule 19, 28 U.S.C.A.

B. The petitioner also argues that the threat of multiple and unapportioned taxation of income from interstate commerce violates the interstate commerce and due process clauses of the United States Constitution. The Colorado Supreme Court determined that Coors does no more than solicit business outside of Colorado and therefore is not doing business outside of Colorado for tax purposes in accordance with Public Law 86-272. This factual decision, that Coors only solicits business in other states, is not a federal question and the application of the Federal statute by other states prohibits multiple taxation and, therefore prevents any undue burden on interstate commerce.

The petitioner cites *Evco v. Jones,* 93 S. Ct. 349 (1972) for the proposition that a tax levied on the gross receipts from the sales of intangible personal property in another state is an impermissible burden on interstate commerce. However, petitioner fails to point out that the New Mexico statute in *Evco* is totally different from the Colorado statute in that the type of tax involved in New Mexico was a gross receipts tax imposed on the receipts from services performed in the state. The New Mexico law specifically prohibited taxation of income from the sale of property outside the state. The Colorado Supreme Court considered the threat of double taxation and found it to be insubstantial in view of the Federal statute, 15 U.S.C. 381. The petitioner fails to show any impermissible burden on interstate commerce in view of Public Law 86-272 and the facts in this case. In the absence of a

substantial federal question there can be no review on certiorari.

CONCLUSION

WHEREFORE, the respondents respectfully pray that this Honorable Court deny the petition for writ of certiorari.

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